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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-240

LOIS PALMER,

Petitioner,

- against -

FRANK TICCIONE, EDWARD HAYES, BENJAMIN GIAMBABIO, WILLIAM O'CONNELL, WILLIAM GARGUILO, ROBERT JACOB, and N. PAUL BESCEMI, and THE SCHOOL BOARD OF COPIAGUE UNION FREE SCHOOL DISTRICT #5,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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August 10, 1978

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The petitioner, LOIS PALMER, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding

on May 16, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, as yet unreported, appears at Appendix A, infra, pp. . The opinion of the United States District Court for the Eastern District of New York, 433 F.Supp. 653 (E.D.N.Y. 1977), appears at Appendix B, infra, pp. .

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 16, 1978. The petition for certiorari was filed less than ninety days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE STATUTES INVOLVED

§ 510. Superannuation retirement

1. Retirement upon a superannuation allowance shall be made under the following conditions:

b. Any member who has attained age seventy may be retired at his own request or at the request of his employer if he or his employer files with the retirement board a statement duly attested setting forth at what time subsequent to the execution and filing thereof retirement is desired, and if throughout the year immediately preceding the filing of such statement he shall have been in service as a teacher in this state. The retirement board shall retire said member as of the date so specified or as of such other time within thirty days thereafter as the retirement board may find advisable.

§ 3012. Tenure: certain union free school districts

1. Teachers, principals, supervisors and all other members of the teaching and supervising

staff shall be appointed by the board of education of a union free school district having a population of more than forty-five hundred inhabitants and employment of a superintendent of schools, for a probationary period of three years. The service of a person appointed to any such position may be discontinued at any time during such probationary period, on therrecommendation of the superintendent of schools, by a majority vote of the board of education.

2. At the expiration of the probationary term of a person appointed for such term, subject to the conditions of this section, the superintendent of schools shall make a written report to the board of education recommending for tenure those persons who have been found competent, efficient and satisfactory. Such persons, and all others employed in the teaching, examining or supervising service of the schools of such union free school district, who have served the probationary period as provided in this section, shall hold their respective positions during good behavior and efficient and competent service, and shall not be removed except for any of the following

causes, after hearing, as provided by section three thousand twenty-a of such law: (a) insubordination, immoral character or conduct unbecoming a teacher; (b) inefficiency, incompetency, physical or mental disability, or neglect of duty. Each person who is not to be recommended for appointment on tenure, shall be so notified by the superintendent of schools in writing not later than sixty days immediately preceding the expiration of his probationary period.

3. Notwithstanding any other provision of this section no period in any school year for which there is no required service and or for which no compensation is provided shall in any event constitute a break or suspension of probationary period or continuity of tenure rights of any of the persons hereinabove described.

§ 3013. Tenure: certain other school districts

1. Teachers, principals, except principals of the district, supervisors and all other members of the teaching and supervising staff, of school districts employing eight or more teachers, other than city school districts and school districts

having a population of four thousand five hundred or more and employing a superintendent of schools, shall be appointed by a majority vote of the board of education or trustees upon recommendation of the district superintendent of schools from lists submitted to such district superintendent by the principal of the district in which they are to be employed for a probationary period of not to exceed five years. Any principal of the district, however, shall be appointed by such school authorities upon the recommendation of the district superintendent of schools. Services of a person so appointed to any such positions may be discontinued at any time during such probationary period, upon the recommendation of the district superintendent, by a majority vote of the board of education or trustees.

2. On or before the expiration of the probationary term of a person appointed for such term, except the principal of the district, the district superintendent of schools shall make a written report to the board of education or trustees recommending for appointment on tenure, from lists and reports furnished by the principal of the district,

those persons who have been found competent, efficient and satisfactory. Any principal of the district, however, shall be recommended for appointment on tenure to such school authorities by the district superintendent of schools. By a majority vote the board of education or trustees may then appoint on tenure any or all of the persons recommended by the district superintendent of schools. Such persons shall hold their respective positions during good behavior and competent and efficient service and shall not be removed except for any of the following causes, after a hearing, as provided by section three thousand twenty-a of such law: (a) Insubordination, immoral character or conduct unbecoming a teacher; (b) Inefficiency, incompetency, physical or mental disability or neglect of duty. Each person who is not to be so recommended for appointment on tenure shall be so notified in writing by the district superintendent not later than sixty days immediately preceding the expiration of his probationary period.

3. Notwithstanding any other provision of this section

no period of any school year for which there is no required service and/or for which no compensation is provided shall in any event constitute a break or suspension of probationary period or continuity of tenure rights of any of the persons hereinabove described.

§ 3014. Tenure: boards of cooperative educational services

1. Administrative assistants, supervisors, teachers and all other members of the teaching and supervising staff of the board of cooperative educational services shall be apointed by a majority vote of the board of cooperative educational services upon the recommendation of the district superintendent of schools for a probationary period, upon the recommendation of the by a majority vote of the board of cooperative educational services.

2. On or before the expiration of the probationary term of a person appointed for such term the district superintendent of schools shall make a written report to the board of cooperative educational services recommending for

appointment on tenure persons who have been found competent, efficient and satisfactory. Such persons shall hold their respective positions during good behavior and competent and efficient service and shall not be removed except for any of the following causes, after a hearing, as provided by section three thousand twenty-a of such law: (a) Insubordination, immoral character, or conduct unbecoming a teacher; (b) Inefficiency, incompetency, physical or mental disability or neglect of duty. Each person who is not to be so recommended for appointment on tenure shall be so notified in writing by the district superintendent not later than sixty days immediately preceding the expiration of his probationary period.

§ 3018. Revocation of certificate by district superintendent

A district superintendent shall examine any charge affecting the moral character of any teacher within his district, first giving such teacher reasonable notice of the charge, and an opportunity to defend himself therefrom; and if he finds the charge sustained, he shall annual the teacher's certifi-

cate, by whomsoever granted, and declare him unfit to teach; and if the teacher holds a certificate of the commissioner of education or of a former superintendent of public instruction or a diploma of a state college for teachers or state teachers college, he shall notify the commissioner of education forthwith of such annulment and declaration.

§ 3019. Penalty for teacher's failure to complete contract

Any failure on the part of a teacher to complete an agreement to teach a term of school without good reason therefor shall be deemed sufficient ground for the revocation of the teacher's certificate.

§ 3019-a. Notice of termination of service by teachers

A teacher who desires to terminate his services to a school district at any time, shall file a written notice thereof with the school authorities of such school district or with the board of cooperative educational services or county vocational education and extension board at least thirty days prior to the date of such termination of services. School authorities or such boards which desire

to terminate the services of a teacher during the probationary period shall give a written notice thereof to such teacher at least thirty days prior to the effective date of such termination of services.

§ 3020. Dismissal of teacher

Except as otherwise provided in sections twenty-five hundred twenty-three, three thousand twelve and three thousand thirteen, no teacher shall be removed during a term of employment unless for neglect of duty, incapacity to teach, immoral conduct, or other reason which, when appealed to the commissioner of education, shall be held by him sufficient cause for such dismissal.

§ 3020-a. Hearing procedures and penalties

1. Filing of charges. Except in cities having a population of one million or more, all charges against a person enjoying the benefits of tenure as provided in subdivision three of section one thousand one hundred two, and sections two thousand five hundred nine, two thousand five hundred seventy-three, three thousand twelve, three

thousand thirteen and three thousand fourteen of this law shall be in writing and filed with the clerk of the school district or employing board during the period between the actual opening and closing of the school year for which the employee is normally required to serve. Except as provided in subdivision eight of section two thousand five hundred seventy-three of this law, no charges under this section shall be brought more than five years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.

2. Disposition of charges. Upon receipt of the charges, the clerk of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified

mail. The employee may be suspended pending a hearing on the charges and the final determination thereof. Within five days of receipt of the statement of charges, the employee shall notify the clerk of the employing board whether he desires a hearing on the charges. Unless the employee has waived his right to a hearing within the allotted time, the clerk of the board shall, not later than the end of said five-day period, notify the commissioner of education of the need for a hearing. If the employee waives his right to a hearing the employing board shall proceed, within five days, by a vote of a majority of all the members of such board, to determine the case and fix the penalty or punishment, if any, to be imposed in accordance with subdivision four of this section.

3. Hearings.

a. Notice of hearing. Upon receipt of a request for a hearing in accordance with subdivision two of this section, the commissioner of education shall schedule a hearing, to be held in the

local school district, or county seat, within fifteen days of his receipt of the request therefor, and immediately notify the employee and the employing board of the time and place thereof and the procedures to be followed in selecting a hearing panel.

b. Hearing panel members. For the purposes of this selection the commissioner of education shall maintain a list of hearing panel members, composed of professional personnel without administrative or supervisory responsibility, professional personnel with administrative or supervisory responsibility; chief school administrators, members of employing boards and others, selected from lists of nominees submitted by statewide organizations representing teachers, school administrators and supervisors and the employing boards. Hearing panel members shall be compensated at the rate of fifty dollars for each day of actual service plus necessary travel and subsistence expenses incurred in carrying out the duties of a panel member.

c. Hearing procedures. The commissioner of education

shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. All such hearings shall be held before a hearing panel composed of three members not resident, nor employed, in the territory under the jurisdiction of the employing board, selected in the following manner from the list maintained by the commissioner of education for such purpose: one member shall be selected by the employee, one member shall be selected by the employing board and the third member shall be chosen by mutual agreement of the first two, or, if they fail to agree, by the commissioner of education.

Each such hearing shall be conducted by a hearing officer designated by the commissioner of education and shall be public or private at the discretion of the employee. The employee shall have a reasonable opportunity to testify in his own behalf. Each party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses. All testimony taken shall be under oath which the hearing

officer in charge is hereby authorized to administer. A competent stenographer, designated by the commissioner of education, shall keep and transcribe a record of the proceedings at each such hearing. A copy of the transcript of the hearing shall, upon request, be furnished without charge to the employee involved.

4. Post hearing procedures. Within five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing panel and their recommendations as to penalty if one is warranted, to the employee and to the clerk of the employing board. Within five days of receipt of such hearing report the employing board shall determine the case by a vote of a majority of all the members of such board and fix the penalty or punishment, if any, which shall consist of a reprimand, a fine, suspension for a fixed time without pay or dismissal. If the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record.

5. Appeal. Any employee feeling himself aggrieved may review the determination

of the employing board either by appeal to the commissioner of education as provided for by article seven of this chapter, or by a special proceeding under article seventy-eight of the civil practice law and rules. If the employee elects to institute such proceeding, the determination of the employing board shall be deemed to be final for the purpose of such proceeding.

§ 3021. Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances

A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.

§ 3022. Elimination of subversive persons from the public school system

1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of

superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members and all other personnel and employees of any college or other institution of higher education owned and operated by the state or any subdivision thereof who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a[1] of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any other state or of any political subdivision thereof shall be overthrown or over-

thrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a1 of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations, promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it

for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

§ 3027. Discrimination based on age prohibited

Notwithstanding any provision of law to the contrary, no board of education in any city, union free, common or central school district in this state shall hereafter prohibit, prevent, disqualify or discriminate against any persons who is physically and mentally qualified from competing, participating, or registering for an examination for or from qualifying for, a position as teacher, or be penalized in a final rating by reason of his or her age. Any such rule, requirement, resolution, regulation or penalization of such board shall be void.

Nothing herein contained, however, shall prevent such board from adopting reasonable minimum or maximum age requirements for positions

which require extraordinary physical effort, except where age limits for such positions are already prescribed by law.

QUESTIONS PRESENTED

Where a teacher adjudged and admitted to be fully competent to perform her duties was discharged, pursuant to a retirement law, solely on the basis of age:

(1) Was the Second Circuit Court of Appeals correct in finding no constitutional infirmity in the dismissal of a civil rights action to remedy the unwarranted discharge?

(2) Was the Second Circuit Court of Appeals correct in disagreeing with its sister Seventh Circuit Court of Appeals which held that a teacher cannot be discharged solely on the basis of chronological age and that such a discharge would be unconstitutional?

STATEMENTS OF THE CASE

The facts in this case are not in dispute. Mrs. Palmer, petitioner, has engaged in a teaching career since 1943. Beginning with the 1961-62 school year, she was employed by the respondents, COPIAGUE UNION FREE SCHOOL DISTRICT #5, as a kindergarten teacher. Mrs. Palmer became a tenured teacher within the meaning of New York State Education Law § 3012 at the end of the 1963-64 school year. During each year of her employment, up to and including the 1974-75 school year, Mrs. Palmer received satisfactory evaluation of her performance as a teacher. In her most recent evaluation, on March 10, 1975, her supervisor recommended that Mrs. Palmer be rehired for the 1975-76 school year. Nevertheless, in May, 1975, respondent BUSCEMI informed

Mrs. Palmer that she was to be retired because she had turned 70. The School Board of the COPIAGE UNION FREE SCHOOL DISTRICT #5 met and ratified this decision on June 16, 1975, and then directed the New York State Teachers' Retirement System to place Mrs. Palmer on retirement on August 25, 1975.

After correspondence on the issue, petitioner filed her complaint on December 1, 1975. On January 27, 1977, petitioner's motion for summary judgment and respondents' motion to dismiss were heard before Judge Neaher. On July 5, 1977, Judge Neaher granted respondents' motion to dismiss. Petitioner filed her notice of

appeal July 29, 1977. The U.S. Court of Appeals for the Second Circuit affirmed the district court decision on May 16, 1978. On August 13, 1978, petitioner filed this petition for a writ of certiorari.

POINT I. TERMINATION OF INTELLECTUAL EMPLOYMENT ON THE BASIS OF AGE WITHOUT REASON OR HEARING VIOLATES THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION; IF THE STATE STATUTE SO PROVIDES IT IS UNCONSTITUTIONAL.

A. § 510 of the New York Education Law violates the Equal Protection Clause because the statute's system of classification does not satisfy the "rational relationship" test.

The primary purpose of § 510 of the New York Education Law is to promote efficient distribution of retirement benefits to teachers. Cf. Bevan v. New York State Teachers Retirement System, 44 A.D.2d 163, 355 N.Y.S.2d 185 (1974) (construing § 511, a companion section related

to disability retirement). As part of the definition of eligibility criteria, § 510(1)(b), if interpreted as urged by respondents,[1] permits

[1] Petitioner urged and continues to maintain that § 510 be construed consistently with §§ 3012-14, 3018-22, and 3027 of the New York Education Law, and read as requiring that an employer's request of retirement of a teacher against his or her will meet the general requisites for removal of any teacher or any age, i.e., immoral conduct, neglect of duty, incapacity to teach, or other reasons made explicit in state or school board policy. This point was briefed extensively below and if certiorari is granted will be briefed as a pendent claim.

the local school boards arbitrary power to retire teachers age 70 or older. The statute thus conditions job security on age. Tenured teachers younger than seventy can only be terminated for cause, § 3020, and by specified procedure, § 3020-a, Education Law. Teachers age seventy or older receive different treatment; they can be removed arbitrarily by a mere request of the school board. This type of statutory classification is invalid if "different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated

to the objectives of that statute." Reed v. Reed, 404 U.S. 71, 75-76 (1972). This objective must be the actual, "articulated" purpose of that statute and not a mere hypothetical or speculative justification. McGinniss v. Royster, 410 U.S. 263, 270 (1973); San Antonio School District v. Rodriguez, 411 U.S. 1, 17 (1973). It is therefore not enough that, as Judge Hayes suggests, "....a state might prescribe mandatory retirement for teachers in order to [advance unstated objectives]", Palmer v. Ticcione, No. 77-7444 (2d Cir. May 16, 1978), at 306304 (see Appendix A) (emphasis added), or that a local

school board might have adopted an unstated policy to promote unstated objectives in addition to the primary one set forth by the state.

The objective of efficient distribution of retirement benefits is not furthered by granting local school boards unlimited discretionary power to compel retirement of teachers age 70 or older. In fact, such unlimited power may frustrate efficient distribution of benefits by adding unpredictability to the system (the status of each 70+ year old teacher is problematic) and increasing the

rolls (to whatever extent forced retirements occur).

This unlimited power also frustrates one of the general objectives of the state education system: to hire and retain qualified personnel. Although this Court in Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976), upheld a statute mandating retirement for state troopers who reached the age of 50, this Court did that on the basis of specified relevant factors. For example, in Murgia, the defendants came forward with evidence that physical ability generally declines with age; the

retirement statute was therefore sufficiently related to the state's interest in the physical fitness of its state troopers so as to withstand an equal protection challenge. Here, no evidence has been offered that the skills required of a kindergarten teacher deteriorate with age. In Gault v. Garrison, 569 F.2d 993, 996 (7th Cir. 1977), the court noted that, to the contrary, "...much in the way of knowledge and experience, so helpful to the educational profession, is often gained through years of practice." As Justice Marshall noted in his dissent in Murgia:

> That the Court concludes it is rational to legislate on the assumption that physical strength and well being decreased significantly with age does not imply that it will reach the same conclusion with respect to legislation based on assumptions about mental...ability.
> 427 U.S. at 327, fn. 8.

The Gault court, facing a record devoid of evidence demonstrating a "rational relationship" between deterioration of mental ability or teaching skills and age, refused to extrapolate from Murgia to a case where the reasoning of Murgia made no sense. The equal protection clause bars capricious discrimination, to protect individuals such as Ms. Gault and Mrs. Palmer.

B. §510 of the New York Education Law violates the Equal Protection Clause because the statute's procedure for dismissal of teachers on the basis of age provides no safeguards, whereas state procedure for dismissal of teachers on any other ground provide elaborate safeguards.

New York Education Law has, according to respondents, elaborate procedural safeguards in its provisions governing dismissal of any tenured teacher - as long as the teacher is less than 70 years old.[2]

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[2] As discussed in footnote 1, petitioner takes issue with this statutory interpretation, but if it is carried then the statute is unconstitutional.

§§ 3020, 3020-a, 3021, 3022. But New York Education Law has no procedural safeguards written into its provisions governing any dismissal of any tenured teacher seventy years of age or older. The Gault court held that

> ....the classification of teachers between those who are afforded and those who are not afforded procedural safeguards before their removal on its face discriminates against persons who are similarly situated. Accordingly, we cannot sanction the total lack of procedural equality suffered by teachers who have reached the age of 65 without a record showing the presence or absence of a justifiable and rational state purpose. Gault v. Garrison, 569 F.2d 993, 997 (7th Civ. 1977).

The Gault argument is equally applicable and equally compelling in the case at bar.

C. §510 of the New York Education Law violates the Due Process Clause because it allows the taking of property without a prior hearing.

Whenever property or liberty are threatened by state action, due process is triggered as a limitation upon that action. Perry v. Sindermann, 408 U.S. 593 (1972). In general, procedural due process must be afforded to those condemned by state action "to suffer grievous loss." Goldberg v. Kelly, 397 U.S. 254, 262 (1970); see also, Bell v. Burson, 402 U.S. 535 (1971). In particular, notice and some kind of hearing are required before property is finally taken. See North Georgia

Finishing v. Di-Chem, 419 U.S. 601 (1975) and Fuentes v. Shevin, 407 U.S. 67 (1972); see also, e.g., Wolff v. McDonnell, 418 U.S. 539, 557-8 (1974). In this case, however, despite the fact that Mrs. Palmer's property right in continued employment has been infringed by respondents' interpretation of New York Education Law §510(1)(b), no procedural safeguards were accorded at any time. Thus, the statute is violative of due process as guaranteed by the Fourteenth Amendment and as such must be invalidated.

(i) Mrs. Palmer has a property right to her job as a Kindergarten teacher.

The right to public employment has

been accorded the protection of due process in the past. See Perry v. Sindermann, supra, enforcing another teacher's employment as a property right and the consistent line of citations employed as its reasoned base. See also Arnett v. Kennedy, 416 U.S. 134 (1974). While it is well settled that a tenured teacher has a property right in continued employment unless cause for dismissal is shown, Arnett, supra, tenure is not a prerequisite to the application of due process, for property may be based upon a need to "protect those claims upon which people rely in their daily lives." Roth v. Regents, 408 U.S. 564, 577 (1972).

Mrs. Palmer was arbitrarily terminated after a period in which the employment rights had become vested, i.e. after a period of tenure.[3] Yet respondents' interpretation of §510(1)(b) permits termination by arbitrary act. A board cannot either re-define Mrs. Palmer's property right as not property or affect it without due process, since the right to property is protected by the Federal Constitution. See in general, Monaghan, Of "Liberty" and "Property", 62 Cornell L. Rev. 405, 440 (1977),

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[3] Although Murgia involved a non-probationary employee discharged for age, the due process issue was not specifically raised there. Moreover, there was a uniform rule applying to a class of people which rule was based on defensible generalization. Here respondents would give unbridled discretion for selective discrimination.

defining the Federal interest in state law created property rights. Regardless of its moorings in state law, once property is created its protection can be federal, and any abridgement must satisfy due process standards.

(ii) §510(1)(b) of the New York Education Law is violative of due process in that it delegates unfettered discretion to the School Board.

In a discussion of the constitutionality of a rule of the Board of Tax Appeals which allowed it to disbar an attorney at its discretion without a hearing or even a statement of reason, this Court stated that discretionary power "must be construed to mean the

exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process." Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926) (case disposed of on other grounds). Mrs. Palmer had a right to an appropriate hearing appropriately conducted.

D. Discharge on age creates an irrebuttable presumption.

The facts of Mrs. Palmer's case bring it within the holding of La Fleur v. Cleveland Board of Education, 414 U.S. 632 (1974). In La Fleur, the Court struck down as a violation of the Due Process Clause of the Fourteenth Amendment mandatory maternity leave rules for school teachers in Cleveland, Ohio, and Chesterfield County, Virginia. While recognizing the school boards' interest in preserving continuity of instruction and assuring the physical capability of school teachers, the Court found that the mandatory termination provisions of the

Cleveland and Chesterfield County rules

> "surely operate to insulate the classroom from the presence of potentially incapacitated teachers. But the question is whether the rules sweep too broadly [citation omitted]...that question must be answered in the affirmative, for the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor - or the school board's - as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary." 414 U.S. at 644.

The similarity of the fact situation in the case at bar to the situation in La Fleur is striking. Here, age, a physical condition like pregnancy, has been permitted to operate as an irrebuttable presumption of mental incompetency. The La Fleur decision struck down mandatory pregnancy leave rules, strongly implying that nothing less than a case by case determination of fitness would suffice. Allowing §510(1)(b) of the New York Education Law to operate as a license for school boards to dismiss teachers over age 70 at will and in an arbitrary fashion, even in the absence of a hearing on

fitness (indeed, in Mrs. Palmer's case, in the face of an evaluation finding her eminently qualified to continue teaching) runs counter to the holding of La Fleur and the Due Process Clause.

POINT II. THE DECISION OF THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT IN THIS CASE EXPLICITLY CONFLICTS WITH THE DECISION OF THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN GAULT V. GARRISON, NOW THE SUBJECT OF A PETITION FOR CERTIORARI; SUPREME COURT REVIEW IS THEREFORE APPROPRIATE.

The plaintiffs in both Palmer v. Ticcione and Gault v. Garrison, 569 F.2d 993 (7th Cir. 1977), are public school teachers who were retired against their will and in spite of their continued capability to teach, because they had reached "retirement age." The defendants in both cases are the school personnel who executed the retirement decision.

As Judge Hays wrote for the Second Circuit, "...Gault involves a factual situation very similar to that of the instant case - the major difference is that the retirement age in Gault was 65, not 70 [as it was in Palmer]..." Palmer v. Ticcione, No. 77-7444 (2d Cir. May 16, 1978), at 3061 (see Appendix A).

The existence of conflicting decisions on the same issue by different U.S. Circuit Courts of Appeals is a well-established reason for granting a writ of certiorari. See Bingler v. Johnson, 394 U.S. 741 (1969) and Avco Corp. v. Aero Lodge 735, 390 U.S. 557 (1968),

rehearing denied 391 U.S. 929 (1968); Revised Rules of the Supreme Court of the United States, Rule 19(1)(b). Irreconcilable Circuit Court opinions on the same important federal question merit the clarification only the Supreme Court can supply. A writ of certiorari is therefore appropriate in this case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

DATED: NEW YORK, NEW YORK
August 10, 1978

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 466—September Term, 1977.

(Argued January 23, 1978 Decided May 16, 1978.)

Docket No. 77-7444

LOIS PALMER,

Plaintiff-Appellant,

v.

FRANK TICCIONE, HOWARD HAYES, BENJAMIN GIAMBABIO, WILLIAM O'CONNELL, WILLIAM GARGIULO, ROBERT JACOB, N. PAUL BUSCEMI, and THE SCHOOL BOARD OF THE COPIAGUE UNION FREE SCHOOL DISTRICT #5,

Defendants-Appellees.

Before:

HAYS and GURFEIN, *Circuit Judges,*
and BRYAN, *District Judge.**

Appeal from an order of the United States District Court for the Eastern District of New York, the Honorable Edward R. Neaher, *Judge,* dismissing plaintiff's allegations of age discrimination in violation of the equal pro-

* Honorable Frederick van Pelt Bryan, United States District Judge for the Southern District of New York, sitting by designation. Judge Bryan had voted to affirm. He unfortunately passed away before this opinion was drafted. As a result, his concurrence could not be recorded.

tection and due process clauses of the Fourteenth Amendment for want of a substantial federal question.

Affirmed.

JONATHAN A. WEISS, New York, N.Y., *for Plaintiff-Appellant.*

CHARLES D. MAURER, New York, N.Y., (Henry Weinstein, New York, N.Y., on the brief), *for Defendants-Appellees.*

HAYS, *Circuit Judge:*

Appellant, Lois Palmer, commenced this action under 42 U.S.C. §1983 (1940) for age discrimination in violation of the equal protection and due process guarantees of the Fourteenth Amendment. The district court granted the defendants' motion to dismiss for want of a substantial federal question. For the reasons stated below, we affirm the dismissal of the complaint.

I

The facts are undisputed. Appellant has been a teacher since 1943. She has been employed by the defendant Copiague Union Free District #5 as a kindergarten teacher since the 1961-62 school year. She received tenure at the end of the 1963-64 school year. In February 1975, she reached the age of 70. On May 15, 1975, she met with defendant N. Paul Buscemi, the Copiague superintendent of schools. He informed her that she was to be retired at the end of the school year because she had reached the retirement age of 70. This decision was subsequently ratified by the Copiague school board, and the New York State Retirement System was directed to place Mrs. Palmer on retirement status as of August 25, 1975.

It is not disputed that appellant is willing and able to teach. Her performance as a teacher was rated satisfactory in each year of her employment. In the last evaluation, made just before she was retired in 1975, her principal recommended that she be rehired, "[s]ubject to review of compulsory retirement under New York State Education Law."

Appellant contends that retirement solely on the basis of her age violates her constitutional and state law rights. Essentially, she claims: that compulsory retirement at age 70 violates the equal protection clause; that it creates an irrebuttable presumption of incompetency based on age; that, as a tenured teacher, she is entitled to a hearing before termination; and that, in the alternative, the New York Education Law should be read to prohibit compulsory retirement or, if not, to require a hearing before termination.

II

Compulsory retirement systems have come under constitutional attack in several contexts. These equal protection and due process challenges have been rejected by this and other courts. The only exception is *Gault* v. *Garrison,* 569 F.2d 993 (7th Cir. 1977). In that case, the Seventh Circuit ruled that a retired teacher is entitled to a trial on her age discrimination claim. Because *Gault* involves a factual situation very similar to that of the instant case—the major difference is that the retirement age in *Gault* was 65, not 70—and because we disagree with the *Gault* holding, we think it appropriate to focus on this issue once again.

The ruling in *Gault* is premised on the implications of the Supreme Court's most recent decision in this area. In *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S.

307 (1976), the Court upheld a state law requiring the mandatory retirement of uniformed police at age 50. First, *Murgia* established that the proper standard for equal protection review in a case challenging a compulsory retirement statute is the rational basis test. *Id.* at 312-14. Applying this standard, the Court found that forced retirement at age 50 did foster the purpose identified by the state; it assured the continued physical preparedness of the state's uniformed police. *Id.* at 314-16. In *Murgia*, there had been a trial, and there was evidence in the record to support the conclusion that physical preparedness is rationally related to age.

As in the instant case, but unlike *Murgia*, *Gault* involved an appeal from an order dismissing the complaint. The *Gault* court assumed that the strongest justification for a retirement law for teachers is to remove those who are unfit. Working from that premise, it held that, absent an evidentiary showing, there was no reason to assume that there is any relationship between advancing age and fitness to teach. *Gault* distinguished *Murgia* as involving a question of whether physical fitness declines with age, and noted that there was evidence in the record to support the conclusion that it does. It contrasted this with the question whether teaching ability, which involves predominately mental skills, similarly declines with age. Absent an evidentiary showing, the court saw no reason to assume that it does; in fact, it speculated that the knowledge and experience necessary for teaching increases with age.[1]

1 *Gault* also distinguished *Murgia* on another ground. It noted that, as between teachers and policemen, the consequences of lack of fitness differ substantially. If a police officer is not fit, his inability to perform could become a matter of life or death. Thus, a general, perhaps overly broad rule is justified to prevent such occurrences. If a teacher becomes unfit, however, the consequences are not so immediate. There is adequate

Accordingly, it remanded for further proceedings to determine whether compulsory retirement of teachers at age 65 is rationally based. 569 F.2d at 9960.

We decline to follow *Gault* for two reasons. First, while there is a valid distinction between the instant case and *Murgia*, we cannot distinguish the prior cases that have sustained compulsory retirement statutes for occupations that involve primarily mental skills. In *Johnson* v. *Lefkowitz*, 566 F.2d 866 (2d Cir. 1977), we upheld the constitutionality of §70 of the New York State Retirement and Social Security Law (McKinney's 1971), which requires tenured civil servants to retire at age 70. In *Johnson*, the plaintiff had been dismissed from his position as senior attorney in the Real Property Bureau of the state's law department. In *Rubino* v. *Ghezzi*, 512 F.2d 431 (2d Cir.), *cert. denied*, 423 U.S. 891 (1975), we upheld the constitutionality of the mandatory retirement of state judges at age 70. And, in *Weisbrod* v. *Lynn*, 383 F.Supp. 933 (D.D.C. 1974), *aff'd*, 420 U.S. 940 (1975), mandatory retirement of federal civil servants at age 70 was upheld as constitutional, even though the statute undoubtedly requires the retirement of some civil servants who are engaged in occupations that involve primarily mental skills. *Cf. Weiss* v. *Walsh*, 324 F.Supp. 75 (S.D.N.Y. 1971), *aff'd*, 461 F.2d 846 (2d Cir. 1972), *cert. denied*, 409 U.S. 1129 (1973) (denial of state-endowed chair to college professor over 65 is not unconstitutional age discrimination).

Second, *Gault* too narrowly conceives the possible rational bases for a compulsory retirement statute. Unrelated to any notion of physical or mental fitness, a state might prescribe mandatory retirement for teachers in order to

time to effect his or her removal via appropriate procedural means. 569 F.2d at 996.

While this distinction has merit, we do not find it sufficiently persuasive in view of the considerations expressed below.

open up employment opportunities for young teachers—particularly in the last decade when supply has outpaced demand, or to open up more places for minorities, or to bring young people with fresh ideas and techniques in contact with school children, or to assure predictability and ease in establishing and administering pension plans. A compulsory retirement system is rationally related to the fulfillment of any or all of these legitimate state objectives.

Thus, it would seem clear that, *Gault* notwithstanding, the New York State compulsory retirement system for teachers is immune from constitutional attack. However, appellant seeks to distinguish the instant case on two grounds. First, she argues that, since the statute must "rationally [further] the purpose *identified* by the State, . . ." *Murgia, supra,* 427 U.S. at 314 (emphasis added); *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 17 (1973), we may only look to the purpose of the compulsory retirement law as evidenced by the statutory scheme. Section 510(1)(b) of the New York Education Law (McKinney's 1969), which provides for compulsory retirement at the employer's discretion, is part of a statute governing retirement benefits.[2] Thus, appellant contends

2 N.Y.Ed. Law §510(1)(b) (McKinney's 1969) provides:

> Any member who has attained age seventy may be retired at his own request or at the request of his employer . . . if throughout the year immediately preceding . . . he shall have been in service as a teacher in this state.

On its face, §510 seems to be more concerned with eligibility for retirement benefits than with compulsory retirement. Article 11 of the Education Law, of which §510 is a part, has been characterized as a statute "primarily designed to *provide benefits* to certain qualified superannuated or disabled [teachers] . . ." not "to enforce a [teacher's] retirement without consent. . . ." *Bevan* v. *New York State Teachers' Retirement System,* 44 A.D.2d 163, 165, 355 N.Y.S.2d 185, 187-88 (1974) (emphasis in original) (construing §511, a companion section related to disability retirement).

that the only possible purpose of the statute is to further the efficient distribution of retirement benefits. She argues that compulsory retirement is not rationally related to this purpose because the statute provides for compulsory retirement at the discretion of the employer. This encourages unpredictability in the administration of the pension program. Also, she contends that, to the extent that able teachers are forced to retire at age 70, compulsory retirement defeats the purpose of the statute by adding unnecessarily to the retirement rolls. Second, appellant argues that because this case involves a statute that provides for discretionary rather than mandatory compulsory retirement, the precedents are inapposite.

Closer scrutiny of the statute provides the answer to the first argument. Section 501(1)(b) is permissive; it allows individual school boards to implement compulsory retirement policies. *See Harren* v. *Middle Island Central School District #12,* No. 12656/74 (Sup. Ct. 1974), *aff'd* 49 A.D.2d 879, 373 N.Y.S.2d 20 (1975). Thus, if an individual school board adopts a compulsory retirement policy, whether mandatory or discretionary, it may be to further any of the purposes suggested above, without regard to the narrow context of the empowering statute. Since such a board adopted policy would be supportable as rationally based, we would be constrained to uphold it as a legitimate exercise of a statutorily authorized power.

With regard to the second argument, we fail to see its relevance. The record is inconclusive on whether Copiague has adopted a mandatory or discretionary retirement policy. There is nothing in the record to indicate that the appellant was discharged under anything other than an across-the-board, mandatory retirement policy. If so, then, as noted above, the board's action is clearly immune from constitutional attack. However, even if appellant was re-

tired under a discretionary policy, the result would be the same. First, a discretionary retirement policy would still be rationally related to a legitimate state goal: it would further any of the purposes noted above, with the exception of those related to the maintenance of pension plans. Second, the *Johnson* case would still be on point. *Johnson* involved §70 of the New York Retirement and Social Security Law (McKinney's 1971), a statute that is functionally equivalent to discretionary retirement. Subsection (c) provides that a civil servant may be retained beyond age 70 under certain conditions. If he or she is retained, however, he or she is subject to termination upon sixty days' notice. Johnson had been given two extensions and was then summarily retired. The court found no constitutional infirmity with that system. We find none in the instant case either.

We reach the same conclusion with regard to the due process attack on compulsory retirement as establishing an irrebuttable presumption. That claim is analytically very similar to the equal protection one. If the statutory classification is sustainable as rationally based, then it should not fall because it might also be labeled a presumption. Moreover, the due process claim was before the Court in *McIlvaine* v. *Pennsylvania*, 415 U.S. 986 (1974), and *Weisbrod* v. *Lynn*, 420 U.S. 940 (1975), *aff'g* 383 F.Supp. 933 (D.D.C. 1974), and this court in *Rubino* v. *Ghezzi*, 512 F.2d 431 (2d Cir.), *cert. denied*, 423 U.S. 891 (1975). In each case it was rejected.

Appellant also claims that she was entitled to a due process hearing before being retired. However, we can see no purpose for a hearing if appellant was retired under an across-the-board, mandatory retirement system. And even if a discretionary system was employed, we would be constrained to follow *Johnson*, *supra*, and deny this claim.

In *Johnson*, we held that a hearing is not required because the benefits of holding such a hearing are outweighed by the burdens imposed upon the state by requiring a hearing in every case. 566 F.2d at 869.

III

Appellant also raises several state law claims. She contends that compulsory retirement is forbidden by N.Y. Ed. Law §3027 (McKinney's 1969).[3] She also asserts that §510(1)(b) should be read in conjunction with §§3018-3022 of the Education Law, governing the dismissal and discipline of tenured teachers, to, amongst other things, require a hearing before termination.

The first question has, apparently, never been determined by the New York courts. The second, however, has been, and the result has been unfavorable to the appellant. *Harren* v. *Middle Island Central School District #12*, No. 12656/74 (Sup. Ct. 1974), *aff'd*, 49 A.D.2d 879, 373 N.Y.S. 2d 20 (1975).[4] In any case, we do not think it necessary

---

3 N.Y.Ed. Law §3027 (McKinney's 1970) provides:

> Notwithstanding any provision of law to the contrary, no board of education . . . shall hereafter prohibit, prevent, disqualify or discriminate against any person who is physically and mentally qualified from competing, participating, or registering for an examination for or from qualifying for, a position as teacher, or be penalized in a final rating by reason of his or her age. Any such rule, requirement, resolution, regulation, or penalization of such board shall be void.
>
> Nothing herein contained, however, shall prevent such board from adopting reasonable minimum or maximum age requirements for positions which require extraordinary physical effort, except where age limits for such positions are already prescribed by law.

Section 3027 seems to be aimed at prohibiting age discrimination in hiring. However, its language could be read to encompass a prohibition against discrimination from continuing qualification as a teacher, i.e., against compulsory retirement.

4 In various other contexts, the New York courts have consistently held that retirement statutes or regulations are not inconsistent with or mod-

to decide these issues. Since the underlying federal claim was properly dismissed, the denial of pendent jurisdiction over the state claims was proper. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966); *Chasteen* v. *Trans World Airlines, Inc.*, 520 F.2d 714 (8th Cir. 1975). Moreover, pendent jurisdiction was properly denied because the state courts are a more appropriate forum for these issues. *Pride* v. *Community Sch. Bd. of Bkly'n, N.Y. Sch. Dist. #18*, 482 F.2d 257, 272 (2d Cir. 1973).

IV

Today's decision is not intended as an endorsement of compulsory retirement for teachers or compulsory retirement in general. Rather, we are aware of the many older Americans who continue to be able and eager to work beyond age seventy. We are also aware of the debilitating effects that compulsory retirement has on many such individuals, with regard to their economic situation, their health, their outlook on life, and their continuing opportunities for fulfillment.[5] However, in determining the desirability of compulsory retirement, these considerations

ified by statutes providing for removal only for incompetency and/or only after a hearing. *See People ex rel. O'Brien* v. *Scannel*, 53 A.D. 161, 65 N.Y.S. 832, *aff'd*, 164 N.Y. 572, 58 N.E. 1091 (1900) (Retirement of fireman due to disability is not a "removal" for the purposes of a statute requiring a hearing for removal for incompetency or misconduct); *Geary* v. *Philips*, 53 Misc.2d 337, 278 N.Y.S.2d 506 (1967) (Police: retirement is not a removal without a hearing); *Humbeutel* v. *City of New York*, 125 N.Y.S.2d 198 (Sup. Ct. 1953), *aff'd*, 283 A.D. 1011, 131 N.Y.S.2d 445 (1954), *aff'd*, 308 N.Y. 904, 126 N.E.2d 569 (1955) (Police: retirement is not removal without cause barred by statute).

5 Evidence documenting both the continued ability of older workers and the hardships resulting from compulsory retirement is reported in the legislative history of the 1978 amendments to the Age Discrimination in Employment Act of 1967, discussed *infra*. *S.Rep. No.* 95-493, 95th Cong., 1st Sess., 3-4 (1977).

must be weighed against the social goals that compulsory retirement furthers. This is precisely the type of clash of competing social goals that is best resolved by the legislative process. The federal courts should not second guess the wisdom or propriety of such legislative resolutions as long as they are rationally based.

Congress has recently considered this issue and, after extensive hearings, has amended the Age Discrimination in Employment Act of 1967.[6] The amendments prohibit, with some exceptions, the compulsory retirement of people under seventy, and of federal employees at any age.[7] The original Act requires the Secretary of Labor to make annual reports concerning the effects of the Act, taking into account demographic changes.[8] The 1978 amendments impose on the Secretary the further duty of reporting, by 1981, on the effects of the amendments and the feasibility of extending their coverage.[9] We note these developments because we are persuaded that they reinforce today's decision. There is no question but that the passage of the 1978 amendments to the Age Discrimination in Employment Act was the result of a process that was fair, delib-

6 29 U.S.C. §612 *et seq.* (1976).

7 The Age Discrimination in Employment Act Amendments of 1978, P.L. No. 95-256, §3(a) amending 29 U.S.C. §§631 and 633(a), and §5 amending 5 U.S.C. §8335 (1976) and repealing 5 U.S.C. §3322 (1976). The 1978 amendments contain several exceptions. Tenured university teachers and certain executives are excepted from coverage after age 65. P.L. No. 95-256, §3(a). Certain federal employees, including air traffic controllers, law enforcement officers, firefighters, Alaskan Railroad employees, and federal employees in the Panama Canal Zone, continue to be subject to mandatory retirement. *Id.* §5, amending 5 U.S.C. §8335 (1976).

8 Section 13 of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §632 (1970).

9 Section 6 of the Age Discrimination in Employment Act Amendments of 1978, P.L. No. 95-256, amending §5 of the Age Discrimination in Employment Act of 1967, 5 U.S.C. §624 (1976).

erate, and well informed. Moreover, Congress has provided a mechanism for continually reassessing the effects and the wisdom of its actions on this issue. The superior ability of Congress to collect data and to resolve competing social goals, as well as the flexibility resulting from its ability to monitor the effects of its actions and to make adjustments accordingly, mark this issue as one which the Constitution has appropriately left to the legislative processes, both state and federal.

Affirmed.

3070

520—5-17-78 . USCA—4266

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APPENDIX "B"

LOIS PALMER,

Plaintiff,

v.

FRANK TICCIONE, EDWARD HAYES, BENJAMIN GIAMBABIO, WILLIAM O'CONNELL, WILLIAM GARGIULO, ROBERT JACOB, N. PAUL BUSCEMI, and the School Board of Copiague Union Free School District,

Defendants.

No. 75 C 2007.

United States District Court,
E.D. New York.

June 30, 1977.

Spizz & McEvilly, Community Legal Assistance Corp., Hempstead, N.Y., for plaintiff; Jonathan Weiss, New York City, Legal Aid for the Elderly Poor, of counsel.

Henry A. Weinstein, Garden City, N.Y., for defendants.

NEAHER, District Judge

This is an action seeking the reinstatement of a kindergarten teacher who was involuntarily retired because she had reached seventy years of age. The complaint alleges violations of the First Amendment, the Equal Protection and Due Process Clauses, the Older Americans Act, and various State statutory and constitutional provisions. Jurisdiction is asserted under 28 U.S.C. §§ 1331 and 1343, with pendent jurisdiction for the State claims. Plaintiff has moved for summary judgment and defendants have cross-moved to dismiss the complaint for want of a substantial federal question or for summary judgment.

The facts are not in dispute. Plaintiff, born in 1905, taught in private nursery schools from 1943-59. After two years at another public school, she was hired in 1961 as a kindergarten teacher in the Copiague Union Free School District. At the end of the 1963-64 school year she became tenured under New York Education Law § 3012.

On May 15, 1975, plaintiff, then 70 years old, was informed by defendant N. Paul Buscemi, Superintendent of Schools in Copiague, that she would be retired at the end of the school year in accordance with New York Education Law § 510(1)(b), which states in pertinent part. "Any member [of the teachers' retirement system] who has attained

age seventy may be retired at his own request or at the request of his employer...." The School Board subsequently ratified plaintiff's retirement without a hearing.

Plaintiff is willing and able to work, and all evaluation reports of her work were satisfactory. In her most recent evaluation, on March 10, 1975, plaintiff's principal recommended that she be rehired "[s]ubject to review of compulsory retirement under N.Y. State Educational Law."

Defendants urge that the complaint be dismissed for want of a substantial federal question. Federal claims are insubstantial only if "prior decisions inescapably render the claims frivolous." Hagans v. Lavine, 415 U.S. 528, 538, 94 S.Ct.

1372, 1379, 39 L.Ed.2d 577 (1974). A review of the pertinent decisions shows this to be the case with respect to plaintiff's claims.

In Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976), the Supreme Court unequivocally rejected an equal protection challenge to a statute requiring State police officers to retire at age 50. The rational relationship test was applied to the statute, for the aged is not a suspect class and a right of governmental employment is not fundamental. Id. at 2566-67, 96 S.Ct. 2562. The Court held that, since physical ability generally declines with age, mandatory retirement at age 50 rationally furthers the State's interest in ensuring the physical preparedness of its police.

Id. at 2567-68, 96 S.Ct. 2562.

Murgia simply served to confirm the Court's decisions in similar cases in which it had dismissed the appeal for want of a substantial federal question, Campbell v. Aldrich, 305 U.S. 559, 59 S.Ct. 87, 83 L.Ed. 352 (1938); McIlvaine v. Pennsylvania, 415 U.S. 986, 94 S.Ct. 1583, 39 L.Ed.2d 884 (1974), or summarily affirmed dismissal of the complaint on the same ground, Weisbrod v. Lynn, 420 U.S. 940, 95 S.Ct. 1319, 43 L.Ed.2d 420 (1975); Cannon v. Guste, 423 U.S. 918, 96 S.Ct. 257, 46 L.Ed.2d 245 (1975). All of these decisions rejected equal protection attacks on mandatory retirement statutes, and due process arguments fared no better in Weisbrod and McIlvaine. See Weisbrod v. Lynn, 383 F.Supp. 933, 936-37 (D.D.C. 1974).

On the basis of Weisbrod and McIlvaine, the Court of Appeals for this Circuit stated:

> We are of the opinion that the issue of age restrictions upon the term of office of state judges is properly one for the legislative or electoral processes of the State of New York and that the effort to clothe it in constitutional garb is frivolous.
> Rubino v. Ghezzi, 512 F.2d 431, 433 (2 Cir. 1975).

The Court of Appeals therefore rejected as insubstantial the claim that the mandatory retirement age violates the Due Process and Equal Protection Clauses and affirmed the dismissal of the complaint for want of a substantial federal question.

Plaintiff argues that her claim is not foreclosed by these decisions because they dealt with mandatory retirement statutes rather than a

discretionary retirement statute such as Education Law § 510(1)(b). When faced with a similar challenge to § 510(1)(b), however, the Appellate Division, Second Department, affirmed dismissal of a 70-year-old school teacher's complaint with the following brief memorandum:

> On the record in this appeal, there is no evidence of constitutional discrimination. A mandatory retirement policy at age 70 is not unconstitutional under present standards, and this record does not reveal anything other than a statutorily authorized mandatory retirement policy.
> Harren v. Middle Island Central School No. 12, 49 A.D.2d 879, 373 N.Y.A.2d 20 (2nd Dept. 1975).

As in Harren, there is nothing in the record of this action to distinguish it from the mandatory retirement cases decided by the Supreme Court.

Plaintiff also relies on a suggestion by Justice Marshall, in

dissent in Murgia, that the majority opinion did not sanction a mandatory retirement law for employees whose jobs require mental alertness rather than physical fitness. Murgia, supra, 96 S.Ct. at 2573 n. 8. This comment does not aid plaintiff, however, for a kindergarten teacher surely needs as much physical fitness as mental alertness. In addition, Justice Marshall's comment seems questionable in light of the acceptance of mandatory retirement statutes for teachers in Campbell v. Aldrich, supra, and for judges in Rubino v. Ghezzi, supra.

The remaining federal claims, which are based on the First Amendment and the federal policy against age discrimination expressed in the Older Americans Act, 42 U.S.C. § 3001, et

seq., are also insubstantial. The First Amendment does not protect jobs per se, and federal policy falling short of a constitutional mandate does not provide a basis for relief. Weiss v. Walsh, 324 F.Supp. 75, 77-78 (S.D.N.Y. 1971), aff'd, 461 F.2d 846 (2 Cir. 1972), cert. denied, 409 U.S. 1129, 93 S.Ct. 939, 35 L.Ed.2d 262 (1973).

Accordingly, defendants' motion to dismiss for want of a substantial federal question is granted.

SO ORDERED.

In the

United States Court of Appeals

For the Seventh Circuit

No. 74-1579

JULIA GAULT, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

JAMES E. GARRISON, President, Board of Education, School District 215, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 C 931—Frank J. McGarr, *Judge.*

DECIDED DECEMBER 20, 1977

Before BARNES, *Senior Circuit Judge,*[1] SWYGERT and PELL, *Circuit Judges.*

SWYGERT, *Circuit Judge.* Julia Gault, on behalf of herself and others similarly situated, filed suit under 42 U.S.C. § 1983 challenging the constitutionality of governmental mandatory retirement requirements. Plaintiff contends that defendant school board's policy of

[1] The Honorable Stanley N. Barnes of the United States Court of Appeals for the Ninth Circuit is sitting by designation.

forced retirement is unconstitutional as violative of both equal protection (by discriminating against plaintiff on the basis of age) and due process (by creating an irrebuttable presumption and by terminating public employment arbitrarily). Shortly after the complaint was filed, the district court granted defendants' motion to dismiss and plaintiff appealed.[2]

After oral argument was heard, this court issued an order staying the appeal pending a ruling in *Massachusetts Board of Retirement v. Murgia*, 376 F. Supp. 753 (D. Mass. 1974), *prob. juris. noted*, 421 U.S. 974 (1975). *See* 523 F.2d 205 (7th Cir. 1975). Following the decision in *Murgia*, 427 U.S. 307 (1976), we ordered the parties to file supplemental briefs. We now treat the constitutional issues raised by plaintiff and, for the reasons stated below, reverse the order of the district court.

I

Although the facts were stated in our previous opinion, a brief resume may be helpful. Upon reaching the age of 65, plaintiff, a tenured biology teacher at Thornton Fractional Township South High School, located in Cook County, Illinois, was informed by the district school board that she would have to retire at the end of the academic year.

The Illinois School Code of 1961, as amended, Chapter 122 of the Illinois Revised Statutes, does not require the retirement of teachers at any age. It does provide, however, that the tenure of public school teachers shall end at age 65 and that any subsequent employment shall be on an annual basis. Ill. Rev. Stat. ch. 122, § 24-11. Furthermore, the School Code does not afford teachers over 65 the extensive procedures which a school board

[2] This case, though filed as a class action, was dismissed before the question of class certification was reached.

must follow to dismiss or remove a teacher.[3] *Id.* at § 24-12.

This statutory scheme is supplemented by defendant school board's policy which states that "a teacher who reaches the age of sixty-five before the end of a school year shall retire on that date following his 65th birthday . . . ." Policy No. 4146. This policy thereby goes a step further than the School Code and removes all teachers over 65 under the board's jurisdiction from any consideration for this annual retention. It was pursuant to this policy to which plaintiff was terminated.

II

Plaintiff contends that the board policy of compulsory retirement violates her equal protection rights both substantively and procedurally: first, by requiring those over 65 years of age to retire, and second, by denying those over 65 those procedures granted to any other teacher upon termination. We note at the outset that this case does not involve a claim of a right to government employment, but rather concerns only the access to continued eligibility for such employment.

Our first task in assessing an equal protection claim is to determine the proper standard of judicial review. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 253 (1974). The Supreme Court has employed at least two standards of review: the traditional rational basis test wherein classifications are constitutional if they bear a rational relationship to a permissible state interest, *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970), and the standard of strict judicial scrutiny wherein classifications are constitutional only if they are necessary to promote a compelling state interest. *Dunn*

[3] This procedure for dismissing or removing a teacher includes a hearing, written notice of charges, a bill of particulars, representation by counsel, cross-examination of witnesses, maintenance of a record of the proceedings, and a decision by majority vote of all members of the board. Ill. Rev. Stat. ch. 122, § 24-12. None of these protections were afforded plaintiff as she was over 65.

v. Blumstein, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969). The latter, more rigid, test is applied when reviewing state-created classifications which interfere with the exercise of a fundamental right or involve a suspect classification. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16-17 (1973).

Which standard to apply in determining whether a compulsory retirement provision denies equal protection was answered in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). The Court in that case held that the right of governmental employment is not fundamental and that age does not constitute a suspect class. *Id.* at 313-14. Accordingly, the Supreme Court held the standard of strict scrutiny inappropriate and examined the mandatory retirement statute under the traditional rational basis test. Our inquiry in this case, therefore, is directed to ascertain whether the articulated state interest is legitimate and whether the age 65 classification for the retirement of school teachers is rationally related to furtherance of that state interest.[4]

In *Murgia* a uniformed state policeman challenged a state statute which forced him to retire at age 50. The Court observed that the purpose identified by the state was a desire "to protect the public by assuring physical preparedness of its uniformed police." 427 U.S. at 314. The record included testimony presented to the trial court pertaining to the rigors and demands of uniformed police activities as well as medical testimony concerning the relationship of age to the ability to perform those functions. Based upon this evidence, the Court concluded

[4] Plaintiff urges this court to apply an intermediate or third equal protection test, wherein the challenged law must bear a "substantial relation" to the purpose it seeks to accomplish. The Supreme Court seems to have used such a test in the areas of discrimination based on sex and illegitimacy. *See, e.g., Trimble v. Gordon*, 430 U.S. 762 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Mathews v. Lucas*, 427 U.S. 495 (1976); *Reed v. Reed*, 404 U.S. 71 (1971). We are compelled to decline plaintiff's invitation as *Murgia* is clearly dispositive in this regard.

that a clear rational relationship existed between the classification and its articulated purpose. *Id.* at 315.

In following the Supreme Court's analysis, we look first for an identifiable state purpose in the statutory termination of tenure and the local board's mandatory retirement of schoolteachers at age 65. Because this case was dismissed shortly after the complaint was filed, no evidence has been presented and no affidavits have been filed; the court did permit plaintiff to file an "offer of proof."[5] The defendants have not identified the purpose of the requirements in question; their briefs only hint that the purpose may be to remove unfit teachers. In *Murgia*, the Court called upon "the purpose identified by the State" as that to which the age classification must bear a rational relationship. Without such a purpose demonstrated in the instant case, we cannot, absent further proceedings, justify the challenged provisions.

Even if we could assume that the purpose of these provisions is to prevent the retention of unfit teachers, the requirements must fall. Again, unlike the situation in *Murgia*, there has been no evidence presented to indicate any relationship between the attainment of the age of 65 and a schoolteacher's fitness to teach. The physical demands of teaching do not even begin to approach those found by the Supreme Court, upon credible evidence, to be critical to the performance of uniformed state police duties. No evidentiary proof is necessary to note that teaching is a profession in which mental skills are vastly more important than physical ability. We cannot assume that a teacher's mental facilities diminish at age 65. On the contrary, as suggested by plaintiff's offer

[5] A hearing on defendants' motion to dismiss was set for May 17, 1974. On May 16, however, the district court advised plaintiff's attorney not to bring to the courtroom the witnesses scheduled to testify on her behalf. The next day, the district court announced from the bench its ruling granting the motion to dismiss. Following this announcement, the court granted leave to plaintiff to submit an offer of proof summarizing the evidence which would have been presented had the hearing gone forward. On May 22 the district court issued its memorandum opinion and order.

of proof, much in the way of knowledge and experience, so helpful to the educational profession, is often gained through years of practice.

Another distinction must be drawn between this case and *Murgia*. Because of the nature of the duties required of the policemen in the latter case and the imminent possibility of unfitness shown to be related to advancing age, failure to perform properly in any given instance could become a matter of life or death. In contrast, if a teacher becomes unift, whether because of age or other factors, it does not become a matter of such immediacy that there is not time or opportunity to take appropriate procedural steps for his or her removal. By using the procedures normally taken for the removal of a teacher alleged to be unfit, there is greater guarantee that unfit teachers will be removed while the rest will be able to continue performing their jobs, putting to use the experience and knowledge gained over the years.

It is no answer to say that a state "does not violate the Equal Protection Clause merely because the classifications made by its law are imperfect," *Dandridge v. Williams*, 397 U.S. 471, 478 (1970), when these classifications cannot be shown to be even rationally related to the objective the state is attempting to achieve (still assuming *arguendo* such an objective can be shown by the defendants). In *Murgia*, the Court found no indication that the mandatory retirement provision had "the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute." 427 U.S. at 316. Unlike the Court in *Murgia*, we cannot say that the provisions in the instant case would eliminate any more unfit teachers (assuming again that such is the purpose) than a provision to fire all teachers whose hair turns gray.

The decision in *Murgia* was based upon an evidentiary record showing the state's purpose and how the challenged legislation related to that purpose. Here, there is no record. We cannot uphold as constitutionally valid a classification of public schoolteachers based upon age without a showing that it rationally furthers some identifiable and articulable state purpose.

III

Plaintiff's equal protection claim has yet another aspect. She contends that the lack of any procedure in both the automatic termination of her tenure and her mandatory retirement resulted in treatment unequal to that given to any other teacher who is released. Both tenured and probationary teachers under age 65 are guaranteed procedural safeguards prior to any termination. This situation is similar to that in a recent case decided by this court. In *Miller v. Carter*, 547 F.2d 1314 (7th Cir.), *cert. granted*, 45 U.S.L.W. 3690 (April 18, 1977), we sustained a constitutional challenge to a City of Chicago ordinance which barred persons convicted of certain crimes from obtaining a public chauffeur's license. The ordinance further provided that a person to whom a license had been issued might have his license revoked after conviction of such an offense; however, revocation was not automatic but was subject to administrative discretion. Thus the ordinance created two classes receiving unequal treatment, the distinguishing fact being whether a person was in possession of the license at the time of his conviction, although the members of both classes were similarly situated in that the type of crime was identical. We found this to be an irrational distinction and held it violative of equal protection.

Here, as in *Miller*, the classification of teachers between those who are afforded and those who are not afforded procedural safeguards before their removal on its face discriminates against persons who are similarly situated. Accordingly, we cannot sanction the total lack of procedural equality suffered by teachers who have reached the age of 65 without a record showing the presence or absence of a justifiable and rational state purpose.

Because plaintiff's complaint states a claim that her rights under the Fourteenth Amendment have been violated, the order dismissing the complaint is reversed and the cause is remanded for further proceedings consistent with this opinion.

BARNES, *Senior Circuit Judge*, concurring.

Strict scrutiny is not the proper test for determining whether a mandatory retirement provision denies appellee equal protection, because strict scrutiny of a legislative classification is required only when the classification impermissibly interferes with the exercise of a fundamental right (cases cited in *Murgia*, Note 3), or operates to the peculiar disadvantage of a suspect class (cases cited in *Murgia*, Note 4). If mandatory retirement for a fireman at age 50 does not interfere with the exercise of his fundamental right neither will mandatory retirement interfere with the desire or right of a teacher to teach at age 65. Nor is a teacher within a suspect class. Appellant here has no fundamental right to teach, either at 65, or at any other age. Cf. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16 (1973). Here we must examine the state's classification under the less strict rational-basis standard. To paraphrase *Murgia*, "Since physical ability generally declines with age, mandatory retirement at 65 serves to remove from teaching those whose fitness for work presumptively has diminished with age. This clearly is rationally related to the state's objective."

Whether 65 or 60 or 70 is a proper age for teacher retirement is not here our concern. Imperfect classifications made by legislative bodies are not rendered unlawful by their imperfections. *Dandridge v. Williams*, 397 U.S. at 485, cited in *Murgia*, p. 316-17.

But to apply these principles to the facts of this case is impossible, because no evidence has been presented at any time (as Judge Swygert's opinion points out), and we have no factual basis upon which to judge the issues or to apply the law.

I concur in Judge Swygert's opinion.

PELL, *Circuit Judge*, dissenting.

The majority opinion draws distinctions found to be persuasively supporting the result reached in the opinion between the present case and *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976); however, a fundamental distinction between the two cases appears to be ignored. Because it is a significant distinction in my mind, and for other reasons set out herein, I respectfully dissent.

Murgia drew the line for compulsory retirement at the age of 50, "a certain age in middle life," *id.* at 313. While for personal reasons, as well as documented studies, I would be hesitant to say that the person who has reached 65 years of age is necessarily elderly either physically or mentally, I also think as a matter of law that that age was so well established at the pertinent time as a point at which retirement age was reached that if it is to be changed, the change should be accomplished by the legislative branch and not by judicial action purportedly under the Constitution.

In 1967, the Congress, being aware that approximately half of the states had enacted age discrimination legislation, 1967 U.S. Code Cong. & Admin. News 2215, enacted P.L. 30-302, sometimes referred to as the Age Discrimination in Employment Act of 1967. In House Report No. 805 on the pending legislation it was stated that "the bill outlines a national policy against discrimination in employment on account of age, provides a vehicle for enforcement of the policy, and establishes broad general guidelines for its implementation." 1967 U.S. Code Cong. & Admin. News 2220. That national policy insofar as age limitations were concerned was stated to be "individuals who are at least forty years of age but less than sixty-five years of age." 29 U.S.C. § 631. In the statute itself the Congress stated that the Act's purpose was, *inter alia*, "to promote employment of older persons based on their ability rather than age"; and "to prohibit arbitrary age discrimination in employment . . ." 29 U.S.C. § 621(b). It appears plain that the Congress by so stating the policy did not regard discontinuance of employment beyond the age of 65 to be

age discrimination of an arbitrary nature. Indeed, House Report No. 805 indicates that the major concern was not with the 65 year age standard but with the lower limit, which had been lowered from 45 in the original bill, with argument being considered that in some occupations age discrimination could be found at a lower point. *Id.* at 2219.

That a legislative enactment establishes national guidelines does not, of course, necessarily import constutionality into those guidelines. Nevertheless, when those guidelines are an interwoven part of a broader pattern, as is obviously the situation in this country, of pension and retirement plans and social security statutes, the courts, it appears to me, should be extremely reluctant to tamper with one part of the broad social scheme.

The Supreme Court has told us in *Murgia*, dealing with compulsory retirement of state police officers at the age of 50, that such action by a legislature is presumed to be valid, and that the judicial inquiry must employ a relatively relaxed rational-basis standard reflecting judicial "awareness that the drawing of lines that create distinctions is peculiarly a legislative task." 427 U.S. at 314. This approach to a "middle life" compulsory retirement age directed at one specific occupation suggests that our examination of a compulsory retirement procedure involving a significantly higher age maximum not only applicable to the particular occupation but one generally applicable, and generally deemed appropriate, should be on an *a fortiori* basis insofar as the relativity of the relaxed rational-basis standard is concerned.

The significance of a higher age equation with the propriety of mandatory retirement was implicitly recognized in the *Murgia* district court opinion by the following observation of Judge Aldrich:

> [W]e would anticipate the question of mandatory retirement at age 70 not to be the same as at age 50, but perhaps we say this because of the increasing difficulties that a plaintiff might have to show that at that greater age the state had not made out a factually rational argument.

Murgia v. Commonwealth of Massachusetts Board of Retirement, 376 F. Supp. 753, 756 n.9 (D. Mass. 1974).

In any event, just as the courts should dispose of cases if possible on grounds other than by reaching constitutional issues, the courts should also, it seems to me, where the federal legislative picture demonstrates an alertness to and an orderly resolution of a complex societal problem, exercise restraint in intervening under the constitutional cloak in the developmental process on what could only be a piecemeal basis.

In the present context, Congressional concern and continuing interest is clear. In the original Act, the Secretary of Labor was charged with undertaking an education and research program and was specifically directed to recommend to Congress any measures he deemed desirable to change the lower or upper age limits. 29 U.S.C. § 622. While employers were not prevented by the Act from taking action otherwise prohibited where age is a bona fide occupational qualification reasonably necessary to the operation of a particular business, or where differentiation is based on reasonable factors other than age, or where there is observance of the terms of seniority systems or pension and similar plans which are not subterfuges to evade the purposes of the Act, or where there is discharge for good cause, § 623(f), the Act makes age itself within the Act's limits an unlawful basis for discrimination. § 623(a). In the 1974 amendments, it was provided that the definition of an employer included "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State". 29 U.S.C. § 630(b).

Currently, we find that the legislative process is an unintermitted one. Both the House and Senate have passed amendatory versions which are now in conference committee, the conferees having been appointed late in October of 1977. It, *inter alia*, has been agreed by both houses that the maximum age limit shall be 70 rather than 65. *See* CCH Lab.L.Rep., Employment Practices, Rep. 30, October 20, 1977.

The comprehensive legislative scheme as it continues to develop will not, of course, mean, as it does not now, that every employee in every occupation is automatically entitled to stay on to the maximum age limitation. This, obviously, is on the assumption that legislation in the future will continue to recognize § 623(f) factors permitting under-maximum-age employment termination such as good cause discharge, necessary occupational qualification, and bona fide, non-subterfuge employee benefit plans. The maximum age, however, as it is established from time to time in the public interest appears to me in and of itself to import rationality and to preclude challenge by those exceeding the maximum.

Turning to the particular case before us, it is noted that the Illinois Age Discrimination Act, as contrasted to the federal statute and most state statutes, does not on its face specify a maximum age. *Kennedy v. Community School District No. 7, Champaign County*, 23 Ill. App.3d 382, 319 N.E.2d 243, 246-47 (1974). The court in *Kennedy*, however, rejected a challenge to age 65 retirement by a teacher not only on due process and equal protection grounds but also under the Illinois Age Discrimination Act pointing out that under that legislation, similarly to the federal act, it was not intended to interfere with the operation of non-subterfuge annuity and pension plans. "The long existence of the statutory system of annuities and pensions and its general application to teachers throughout the State demonstrate that the 'retirement system' is not a subterfuge to evade the Age Discrimination Act." 319 N.E.2d at 247.

In the case before us, there is not only the rational relationship between the plaintiff's employment status and a non-subterfuge employee benefit plan but also she had gone beyond the maximum age so specified as a matter of national policy at the time of her termination, even though at the time state employees were not included within the federal statutory coverage.

Further, under the relaxed *Murgia* standard which would be applicable to a person past 65, it appears to me, although it was not expressly articulated by the defense, that the age 65 classification, aside from any

aspect of declining physical or mental vigor, rationally furthers an educational purpose of the state. It is common knowledge that there is a growing surplus of teachers with the forecast that this surplus will continue to grow in size with many recent graduates majoring in education being unable to find employment. With the lifting of compulsory retirement and the continuing in employment of teachers who otherwise would have retired, it is reasonably foreseeable that those pursuing higher education will turn to other lines of endeavor with the result that when sheer physical or mental disability, or death, thins the ranks there will not be quantitative, and possibly qualitative, replacements.

I would hold therefore that the plaintiff has failed to demonstrate an infringement of her constitutional equal protection rights. She also has raised on this appeal a claim of due process violation, both procedural and substantive. I discern no merit in this attack. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Perry v. Sinderman*, 408 U.S. 593 (1972); *Weinberger v. Salfi*, 422 U.S. 749 (1975).

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